proved the commission of an offence under section 11(1) of the Act in that by being in possession of fishing appliances without a licence within territorial waters the accused had failed to comply with Regulation 3(b) and were consequently guilty of an offence under section 11;

(2) that the boat and the fishing appliances were the subject matter of the offence and notwithstanding that no person was convicted of such an offence in the Court below, an order of forfeiture should have been made;

(3) that the material before the Court in this case was inadequate to come to any positive conclusion as to whether innocent passage through Malaysian territorial water is a right and if so what were its precise limits;

(4) that even if there was such a right of innocent passage and such right was in conformity with customary English law or customary international law as it is applied in England, the passage by the accused persons in the circumstances of this case could not be regarded as innocent passage since it contravened Malaysian domestic legislation.

I am all too conscious that my last finding could give rise to some problems in international relations but the matter is not without judicial precedent.

Mr. H.L. Dickstein in his article referred to the judgment of the Supreme Court of the United States in *Whitney* v. *Robertson*[4] where in dealing with international dissatisfaction arising out of the implementation of municipal law obligation the Court said:

"If the country with which the treaty is made is dissatisfied with the action of the legislative department, it may present its claim to the Executive Head of the Government, and take such other measures as it may deem essential for the protection of its interests. The courts can afford no redress."

Again at p. 214 after dealing with the problems which arose between Britain and Norway following from the conviction of a Norwegian citizen for a fishing offence in British territorial waters, he referred to Mr. Justice Jackson's pronouncement in *Lauritzen* v. *Larsen*[5] which is worthwhile repeating here:

"It would not be candid to claim that our Courts have arrived at satisfactory standards or apply those that they profess with perfect consistency. But in dealing with international commerce we cannot be unmindful of the necessity for mutual forbearance if retaliations are to be avoided; nor should we forget that any contact we hold to be sufficient to warrant application of our law to a foreign transaction will logically be as strong a warrant for a foreign country to apply its law to an American transaction."

The moral of this story therefore would appear to be that urgent inter-governmental action is required to clarify the extent of the privilege or the right of innocent passage through these waters.

But as to the matters with which this Court is immediately concerned the order must be that the boat and the fishing appliances in question are forfeited and shall be disposed of as the Police shall direct. The order of the learned Magistrate is set aside to that extent. In the light of the finding of this Court the proceeds of the sale in the sum of $2,000 shall be disposed of by the Director-General of Fisheries in accordance with the jurisdiction vested in him by section 13(2) and section 14(2) of the Act.

Order accordingly.

Solicitors: *Abbas & Ngan.*

KLAXXIE CORPORATION (M) SDN. BHD. v. NG AI GEOK & ANOR.

[O.C.J. (Zakaria Yatim J.) August 4, 1986]

[Kuala Lumpur – Application for Execution No. 217 of 1984]

Practice and Procedure – Judgment in default of appearance – Application to set aside – Whether writ was served – Whether judgment regular – Whether defence has merits – Whether triable issues raised.

In the present case the plaintiff's claim against the defendants was for a sum of $57,330.46 being the outstanding amount due to the plaintiff for goods supplied to the first defendant. By a written agreement dated April 30, 1982 made between the plaintiff and the two defendants, the first defendant was appointed as a stockist of the plaintiff's goods. By clause 16 of the same agreement the second defendant undertook to reimburse the plaintiff against all loss and damage suffered by the plaintiff in the event of the failure of the first defendant to observe, perform or comply with the terms and conditions of the said agreement.

In the present case the defendants applied to set aside the judgment in default of appearance entered against them on March 5, 1984. The defendants contended that the judg-

ment in default of appearance entered against them was not a regular judgment in that the writ was not served on them.

Held: (1) there is a strong probability that the writ was served on both the defendants on February 16, 1984. Since the writ was served on the defendants, the judgment in default of appearance against the defendants is a regular judgment;

(2) the defendants in their affidavits have shown a defence on the merits. In the circumstances, the judgment in default of appearance is set aside.

Cases referred to:

(1) *Evans* v. *Bartlam* [1937] A.C. 473.

(2) *Bank Bumiputra Malaysia Bhd.* v. *Majlis Amanah Raayat* [1979] 1 M.L.J. 23, 24.

APPLICATION FOR EXECUTION.

Miss G. Ambiavagar for the defendant.

Hacharan Singh for the plaintiff.

Cur. Adv. Vult.

Zakaria Yatim J.: This is an application by the defendants to set aside judgment in default of appearance entered against them on March 5, 1984. The defendants also ask the Court to set aside the writ of seizure and sale issued against them on June 28, 1984. The defendants further ask for a stay of execution in respect of the judgment entered in default of appearance. Finally, the defendants ask for an order that the plaintiff pay damages to the second defendant for wrongful execution and costs.

It should be mentioned here that when the defendants filed the notice of motion, they did not include a prayer to set aside judgment in default. In the course of the hearing of the motion, Miss Ambiavagar, counsel for the defendants made an oral application to amend the notice of motion by including a prayer to set aside judgment in default of appearance. Mr. Harcharan Singh, counsel for the plaintiff told the court that he had no objection to the application. I allowed the application and included the prayer to set aside judgment in default of appearance in the notice of motion.

The plaintiff's claim against the defendants was for a sum of $57,330.46 being the outstanding amount due to the plaintiff for goods supplied to the first defendant. By a written agreement dated April 30, 1982 made between the plaintiff and the two defendants, the first defendant was appointed as a stockist of the plaintiff's products. By clause 16 of the same agreement, the second defendant undertook to reimburse the plaintiff against all loss and damage suffered by the plaintiff in the event of the failure of the first defendant to observe, perform or comply with the terms and conditions of the said agreement. Pursuant to the said agreement, the plaintiff supplied to the first defendant goods bearing the plaintiff's brand name for the purpose of selling the same to dealers or representatives authorised by the plaintiff at pre-determined prices. By an agreement dated March 29, 1983, the defendants agreed to discharge fully all monies owing to the plaintiff through a cheque amounting to $24,706.76 made payable to the plaintiff. The cheque was duly presented for payment but was dishonoured and returned to the plaintiff. According to the plaintiff, the total sum owed by the defendants was $57,330.46.

The defendants contended that the judgment in default of appearance entered against them was not a regular judgment in that the writ was not served on them. The affidavits affirmed on behalf of the plaintiff stated that the writ was served on the defendants whilst the defendants' affidavits averred that the writ was never served on them. Counsel for both parties agreed that the deponents of the affidavits be cross-examined in respect of the question of the service of the writ to enable the Court to determine whether or not the writ was duly served on the defendants.

The witnesses who were cross-examined were Cheng Fun Lin, the managing director of the plaintiff company; Jit Singh, the assistant store manager of the plaintiff company; the first defendant, the second defendant and two other witnesses for the defence, Leong Chak Yin and Tok Bok Yung.

Mr. Cheng Fun Lin in his evidence in Court said that on February 16, 1984 he went to a house at No. 27A, Jalan Tapah, Kelang and met both the defendants. He handed them two copies of the writ and requested them to put their signatures at the back of the writ. According to him the defendants refused to do so but they accepted the writs.

Jit Singh testified that he went to the said premises with Mr. Cheng and saw the two defendants there. He said he was present when Mr. Cheng served the writ on the defendants.

The first defendant told the Court that on February 16, 1984 she was at her sister's place. She said that she was expecting a baby and during her

confinement she stayed at her sister's place. She denied that she was at No. 27A Jalan Tapah on February 16, 1984.

The second defendant, in cross-examination said that on February 16, 1984 he was at the coffee shop where he was working. On that day he was at the coffee shop from 7.00 a.m. to 6.00 p.m. He denied that he was served with a writ on that day.

Mr. Leong Chak Yin, in his evidence in Court, said that he was doing his business at the house at 27A, Jalan Tapah. He said that the first defendant did not occupy two rooms at the said premises. He denied that Mr. Cheng served any writ on the premises.

Mr Tok Bok Yeng was a noodle seller at the coffee shop of the second defendant. He worked at the shop from 6.00 a.m. to 7.00 p.m. He told the Court that on February 16, 1984, the second defendant did not leave the coffee shop.

Having heard the evidence of all the witnesses and having watched their demeanours, I come to the conclusion that Mr. Cheng Fun Lin is a truthful witness. His evidence was corroborated by Jit Singh. Mr. Cheng's evidence is also consistent with his affidavits affirmed on March 5, 1984, July 19, 1984 and August 20, 1984 respectively. The first defendant claimed that she had an alibi: she was at her sister's place all the time. In her affidavits affirmed on July 5, 1984 and on July 20, 1984, she gave her address as No. 15, Jalan Kakak Tua, Ladang Eng Aun, Kelang. In her evidence in court she gave her address as 241, Jalan Kapar, Kelang. With regard to the second defendant, he seemed to remember clearly what happened on February 16, 1984. But he did not know the date of birth of his child and neither did he know the date of the Chinese New Year. Mr. Leong Chak Yin admitted in court that his company and the plaintiff were competitors in business.

In my opinion, there is a strong probability that the writ was served on both the defendants on February 16, 1984. Since the writ was served on the defendants, the judgment in default of appearance against the defendants is a regular judgment.

Since the judgment is regular, the next question for the court to consider is whether the defendants have filed an affidavit of merits to show that they have a *prima facie* defence. See *Evans* v. *Bartlam.*[1] See also *Bank Bumiputra Malaysia Bhd.* v. *Majlis Amanah Raayat.*[2]

In his affidavit affirmed on July 5, 1984 in support of the application, the second defendant averred that the plaintiff's action against the defendants was in respect of accounts rendered which left a credit in favour of the plaintiff in the sum of $24,706.76 as at March 31, 1983. According to him by an agreement dated March 29, 1983 the plaintiff received from the second defendant by way of security a cheque No. 550728 for a sum of $24, 706.76. This agreement was mentioned in paragraph 6 of the statement of claim and according to the plaintiff the cheque was subsequently dishonoured. The second defendant, in the same affidavit, said that he also paid a sum of $13,400.37 to the plaintiff leaving a balance of $11,306.39. He exhibited the receipts issued by the plaintiff in respect of the sum of $13,400.37 paid by him to the plaintiff. The receipts were dated in June and July 1983, that is, after the agreement dated March 29, 1983 was concluded. The receipts show that the plaintiff had received payment in the sum of $13,400.37 from the defendants. In his subsequent affidavit affirmed on July 20, 1984, the second defendant disputed that he owed the plaintiff more than $24,706.76. He mentioned that the amount owed by him to the plaintiff was as stated in the agreement dated March 29, 1983. In his earlier affidavit, the second defendant also pleaded a set-off. According to him the plaintiff owed the first defendant trade discount and charges pertaining to the agency account between the plaintiffs and the first defendant since January 1983 which amounted to $15,000.00. He stated that the sum of $11,306.39 ought to be set-off against any sum due from the plaintiff to the first defendant.

In my judgment the defendants, in their affidavits, have shown a defence on the merits. In other words, the defence has disclosed arguable and triable issues.

In the circumstances, I set aside the judgment in default of appearance. The defendants are given fourteen days from the date of this judgment to file their defence. The defendants will bear all costs thrown away by the plaintiff in any event.

Order accordingly.

Solicitors: *Fernandez & Co; Manjit Singh Sachdev & Co.*